United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-2128

To Be Argued By
ELIZABETH A. GAYNES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IMANNUN ABDUT TAWWAB (a/k/a Eric Caesar), NASSIR ABDUL SABUR (a/k/a Irving Donaway), DAWUD ABDULLAH RAHMAN, TARIQ ABDUR RAHMAN (a/k/a Graham Johnson), ABBAS ABDUL RAQIB (a/k/a Robert Young), KASIM ABDUL JABBAR (a/k/a Herschel Lee Armour), SALAH ABDUR RAHMAN (Levon Jackson), ABDUL BASIR AL JABBAR (a/k/a Lester R. Tepway),

Appellants

-against-

PAUL W. METZ, Individually and as Superintendent of Great Meadow Correctional Facility, and BENJAMIN WARD, Individually and as Commissioner of the New York State Department of Correctional Services, MARSHALL MASON, Individually and as Correctional Sergeant, Great Meadow Correctional Facility,

Appellees.

Docket Number
76-2128

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P/S

BRIEF FOR APPELLANTS

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF NEW YORK

PIERCE GERETY, JR.
CLAUDIA ANGELOS
ELIZABETH A. GAYNES
DANIEL J. STEINLOCK
PRISONERS' LEGAL SERVICES
OF NEW YORK
109 Church Street
New York, New York 10007
(212) 285-0370

DATED: New York, New York
December 17, 1976

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BRIEF FOR APPELLANTS

QUESTIONS PRESENTED

1. Whether the district court erred in dismissing plaintiffs' claim that restrictions placed by prison officials on meetings of plaintiff Sunni Muslims with ministers of their faith for religious education violated plaintiffs' rights under the First and Fourteenth Amendments.

2. Whether the district court erred in dismissing plaintiffs' claim that the refusal of prison officials to allow more than one inmate in the special housing unit to receive a legal visit at any given time violates the Fourteenth Amendment right of access to counsel and the courts.

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Northern District of New York, Hon. James T. Foley, dismissing all five causes of action in appellants' civil rights complaint for failure to state claims on which relief could be granted. Appeal is taken from dismissal of the first and fifth causes of action, which involve claims involving freedom of religion and access to counsel.

The complaint was filed on February 23, 1976, leave to proceed in forma pauperis having been granted by the district court on February 20, 1976.* Defendants moved on April 16, 1976, to dismiss the complaint for lack of federal jurisdiction over the subject matter and for failure to state a claim upon which relief could be granted.** In a Memorandum-Decision and Order dated August 25, 1976, Judge Foley ruled that "there are no viable federal civil rights claims presented in the complaint" and ordered that the complaint be dismissed.*** Notice of Appeal was filed on September 20, 1976.

STATEMENT OF FACTS

Appellants (hereinafter referred to as "plaintiffs") are eight members of the Sunni Muslim faith, who, at the time

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* The complaint, excluding exhibits, appears at pp.A1-A20 of the Appendix.

** The affidavit of Assistant Attorney General Timothy F. O'Brien submitted in support of this motion appears at pp. A21-A28 of the Appendix.

*** The Memorandum-Decision and Order appears at pp.A33-A42 of the Appendix.

of the incidents which are the subject of the complaint, were all inmates of Great Meadow Correctional Facility at Comstock, New York. Appellees (defendants below) are the Commissioner of the New York State Department of Correctional Services, the superintendent of Great Meadow Correctional Facility and a correctional sergeant at that facility. Plaintiffs seek a declaration that the refusal to permit all members of the Sunni Muslim community at Great Meadow to meet with visiting ministers for religious instruction violates their First and Fourteenth Amendment rights, and an order prohibiting continuation of this policy, and money damages. In addition, they seek declaratory and injunctive relief and money damages against the superintendent's policy and practice of allowing only one inmate from the "special housing unit" to receive a counsel visit at any given time.

Plaintiffs' complaint alleges the following facts pertaining to the issues raised in this appeal.* In late 1975, there were approximately forty-five inmate members of the Sunni Muslim faith at Great Meadow Correctional Facility (R 19, 30). The facility had no full-time Sunni Muslim minister attached to its staff; it did have a full-time Christian minister (R 35). Although there were inmate "ministers" within the Sunni Muslim community at the facility who led the community

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* Numerals in parentheses refer to the numbered paragraphs of the complaint, Appendix, pp. A1-A20.

in daily and holy day worship and observance, the community also depended on visits from outside ministers, who have greater knowledge of laws and practices of Islam and are especially qualified to provide instruction to adherents of the faith. (PP 19, 22). These ministers usually travelled to Great Meadow from Brooklyn on weekends (PP 10, 29). Because of the distance from Great Meadow and their obligations to their own Mosque they visited Great Meadow relatively infrequently (PP 25, 31). Prior to November 22, 1975, the entire Sunni Muslim community at Great Meadow was permitted to meet as a group with these ministers for religious teaching, advice and ministrations whenever they visited Great Meadow (P 19). These meetings, usually held on weekends, were in addition to the two-hour prayer service, or "Juma," held on Friday afternoons, and to a Monday evening education class which was limited to about 15 inmates (PP 9, 10). No disturbances or threats to prison security resulted from these meetings (P 23).

Sometime prior to November 22, 1975, defendants adopted a policy prohibiting meetings other than the Friday prayer service between outside ministers and the Sunni Muslim community as a group (PP 26-28). Although the previously allowed small group education class was continued, and one other session was added, participation in each education session was limited to fifteen inmates chosen by the institution (P 31). The net effect of the change in policy was to reduce the number of Sunni Muslims who could attend religious instruction and to

prevent many inmates from receiving instruction from the visiting ministers. Pursuant to this policy, the ministers who visited the institution on November 22 and 23, 1975, were informed that they would not be allowed to give religious instruction to the entire community; instead, they were limited to meeting on each day with three inmates (PP 29, 30). This policy had, and continues to have, the effect of limiting the plaintiffs' access to spiritual instruction required by their religion.

The complaint describes in detail the fundamental importance of religious instruction to Sunni Muslims (PP 11-20). Islam is a religious community whose adherents are required to live under the law of God as expressed in the Qur'an (PP 7, 12, 17). The original language of the Qur'an and of much other Muslim religious literature is Arabic, which Muslims must learn in order to read, study and worship in accordance with their religious faith (PP 13-15). For a convert, particularly one whose native language is not Arabic, the process of becoming a Sunni Muslim fully versed in the required practices involves extensive instruction in Arabic and in complex religious laws and concepts (P 16). The assistance of outside ministers is essential to the religious instruction of plaintiffs and other Sunni Muslim inmates (PP 18-20, 22). The rule at issue diminishes the amount of religious instruction any given Sunni Muslim can receive by limiting the contact all members of the community have with the visiting ministers. Con-

sequently, plaintiffs allege, it constitutes a serious infringement of their right to practice their religion (PP 31, 32).

In seeking to challenge this restriction, plaintiffs requested legal assistance of two lawyers from the Albany Law School Legal Assistance Project. These lawyers visited Great Meadow on December 30, 1975, and one of them did consult with his client, who was housed in F-Block, the special housing unit. The other attorney was refused access to her clients, however, pursuant to the standing rule at Great Meadow that no more than one inmate from F-Block can receive a legal visit at any given time. The affidavit filed on defendants' behalf in support of their motion to dismiss confirms that this practice is indeed institutional policy. This rule is applied only to visits by counsel, and not to other visits (P 84).

ARGUMENT

POINT I

THE REFUSAL OF PRISON OFFICIALS TO ALLOW ALL SUNNI MUSLIMS TO RECEIVE RELIGIOUS INSTRUCTION FROM OUTSIDE MINISTERS VIOLATES THEIR RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

The Sunni Muslim plaintiffs in this action have alleged that a policy at Great Meadow Correctional Facility unconstitutionally restricts their access to the ministers of their faith. This recent policy, limiting the number of Sunni Muslims who can receive religious instruction, inhibits the free exercise of that religion in violation of rights protected by the First and Fourteenth Amendments.

It is established law that "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate objectives of the corrections system." Pell v. Procunier, 417 U.S. 817, 822 (1974). It is equally clear that among the rights guaranteed by the First Amendment, none has been more closely guarded than the guarantee of religious freedom.

In protecting the rights of prison inmates to freely practice religion under the free exercise clause, this Court has applied a well-established rule: a restriction on the free exercise of a prison inmate's religion will withstand constitutional scrutiny only if the state proves that it "has an important objective and the restraint on religious liberty

is reasonably adapted to achieving the objective," La Reau v. MacDougall, 473 F.2d 974, 979 (2d Cir. 1972).* The burden of proving an important or substantial government interest is a heavy one, and this Court has repeatedly found inmates' allegations of infringement on the right of free exercise to have stated a claim for relief. Cf. Kahane v. Carlson, 527 F.2d 492 (2d Cir. 1975); Mukmuk v. Comm'r. of Dept. of Correctional Services, 529 F.2d 272 (2d Cir. 1976), cert. denied, ___ U.S. ____, 96 S.Ct. 2238 (1976); Burgin v. Henderson, 536 F.2d 501 (2d Cir. 1976); Mawhinney v. Henderson, 542 F.2d 1 (2d Cir. 1976).** Moreover, once the government has established that some restriction on the free exercise of religion is justified by a substantial interest, it must prove that the regulation is the least restrictive necessary to protect that interest. It is a basic principle of First Amendment

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* This Court has explicitly left open the question of whether the government must justify a restriction on a religious right by a showing of a "compelling government interest," Kahane v. Carlson, supra, 527 F.2d at 495 n.6. Since at this state of review, the question is whether plaintiffs have alleged a good faith religious claim, the precise standard to which the prison officials must be held is not at issue.

** The "hands off" doctrine, apparently relied on by Judge Foley in dismissing the complaint, Memorandum-Decision, p. 5, Appendix, p. A37, clearly is no longer a viable doctrine where First Amendment rights of prisoners are alleged to have been violated. As this Court noted fifteen years ago, "Whatever may be the view [on federal intervention] with regard to ordinary problems of prison discipline, ... we think that a change of religious persecution falls in quite a different category." Pierce v. LaVallee, 293 F.2d 233, 235 (2d Cir. 1961). See also, Cruz v. Beto, 405 U.S. 319 (1972).

law that a limitation on the guarantees of that amendment "must be viewed in the light of less drastic means for achieving the same basic purpose," Shelton v. Tucker, 364 U.S. 479, 488 (1960). See also, Kahane v. Carlson, supra, 527 F.2d at 495; Sostre v. Preiser, 519 F.2d 763 (2d Cir. 1975).

The Muslim inmates in this case, adherents of one of the world's major religions, see Wilson v. Beame, 380 F.Supp. 1232, 1238 (E.D.N.Y. 1974), have been severely limited in their ability to exercise their religious beliefs. They have alleged that the practice of the Islamic faith demands extensive instruction in its theological tenets and obligations. The requirements of this religious education are particularly rigorous for Sunni Muslims like the plaintiffs, who espouse the traditional, orthodox beliefs of Islam.

By their recently-established policy prohibiting group instruction of the whole Islamic community by visiting ministers, and by thus limiting the number of Sunni Muslims who can meet with these ministers, the prison officials have precluded a large number of Muslim inmates, and restricted the others, from participating in a fundamental aspect of their faith. As the plaintiffs have pointed out, the visiting ministers are uniquely qualified to perform the pedagogic function essential to Islam. Since their visits are, of necessity, brief and infrequent, it is essential that all members of the community be given the greatest possible access to them. An unjustified

denial of the Muslims' right to receive this kind of training in the more complex tenets and practices of Islam constitutes a denial of their right to the free exercise of religion.

Under the standards enunciated by this Court, the restrictive policy that was implemented at Great Meadow must be justified by a substantial objective of penal administration in order to withstand First Amendment attack.* No such showing has been made here, nor, in fact, could it have been on a motion to dismiss for failure to state a claim.** The plaintiffs have alleged that the free exercise of their religion requires this instruction, and that the prison has severely and unjustifiably impaired that exercise. At this stage of review, these allegations must, as the district court recognized, be accepted as true. Cooper v. Pate, 378 U.S. 546 (1964);

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* In his Memorandum-Decision and Order dismissing the complaint, Judge Foley made a finding that this policy was "fair and reasonable." Because this is quite clearly not the constitutional standard in a free exercise case, the dismissal was based on an application of erroneous legal principles. The restriction must be more than "fair and reasonable;" the state's burden is substantially higher.

** In moving to dismiss pursuant to Fed. R. Civ. P. 12 (b)(6), defendants explicitly disclaimed any attempt "to contradict or dispute any of the allegations of the complaint." Affidavit of Assistant Attorney General Timothy F. O'Brien, ¶5, Appendix, p. A23. If, despite this disclaimer, the district court intended to treat the motion as one for summary judgment and to consider matters outside the complaint, it was required to give "reasonable opportunity" for all parties to present material pertinent to such motion by Rule 56, Fed. R. Civ. P. 12(b); Dale v. Hahn, 440 F.2d 636, 638 (2d Cir. 1971); 2A Moore, Federal Practice ¶12.09, 2300-02 & nn. 23 & 25.

Memorandum-Decision and Order, p. 3, Appendix, p. A35. The prison's justification for its policy -- whatever it may be -- can only be evaluated through facts developed in further proceedings.* Burgin v. Henderson, supra; 536 F.2d at 504.

Even if it is assumed that the justification for limiting the access of the inmates to instruction with the free world ministers arises from the prison's need to protect its security, no contention has been made that collective religious instruction, in fact, jeopardizes that security. On the contrary, the complaint states, and the defendants at this stage do not dispute that, prior to November, 1975, group worship and group instruction had occurred at Great Meadow utterly without incident, and that group worship continues to be permitted.

That the restriction at issue here deprives the plaintiffs of a substantial right under the free exercise claus. is

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* The explanation for this policy advanced by defendants in their affidavit in support of their motion to dismiss would be patently insufficient to justify the prison's refusal to allow the Sunni Muslims collective instruction with the trained leaders. The defendants offer no more than a general assertion that this restriction is "consistent with proper discipline and management of a state correctional facility." Affidavit of Assistant Attorney General Timothy F. O'Brien, ¶5, Appendix, p. A25. Mere "consistency with proper discipline" does not satisfy the requirement that a restriction on religious freedom be justified by a substantial governmental interest, Burgin v. Henderson, supra, 536 F.2d at 503, and be the least restrictive necessary to achieve that end, Sostre v. Preiser, supra, 519 F.2d at 764.

clear. The prohibition of meaningful access for many Sunni Muslim inmates to instruction in their faith constitutes a serious impediment to the practice of that faith. Great Meadow's policy has not been justified, nor, indeed, could it have been without an evidentiary hearing. The plaintiffs have raised a substantial claim under the First Amendment; therefore the dismissal of this claim was error and should be reversed by this Court.*

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* Plaintiffs have also alleged that the program adopted by the prison to provide for the religious needs of inmates gives Christian inmates greater access to religious counselling than is afforded to Muslims. This presents a claim that defendants have violated that establishment clause of the First Amendment which should, upon remand, be the subject of an evidentiary hearing. "[T]he Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact." Gillette v. United States, 401 U.S. 437, 449 (1971) (citations omitted). As the Supreme Court noted in the case of a single Buddhist inmate in a Texas penal institution, "[i]f he was denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts, then there was palpable discrimination by the State against the Buddhist religion ...." Cruz v. Beto, 405 U.S. 319, 322 (1972).

POINT II

THE REFUSAL OF PRISON OFFICIALS TO ALLOW MORE THAN ONE INMATE IN SPECIAL HOUSING UNIT AT A TIME TO RECEIVE A LEGAL VISIT VIOLATES THE INMATES' RIGHT OF ACCESS TO THE COURTS.

The due process clause of the Fourteenth Amendment guarantees prison inmates a reasonable opportunity to seek and receive the assistance of attorneys in order to effect their right of access to the courts. Procunier v. Martinez, 416 U.S. 396, 419-22 (1974); Johnson v. Avery, 393 U.S. 483 (1969); Ex parte Hull, 312 U.S. 546 (1941); Goodwin v. Oswald, 462 F.2d 1237, 1241 (2d Cir. 1972). As alleged in the complaint, and confirmed by the affidavit submitted by defendants, Great Meadow Correctional Facility has a rule that at any one time no more than one inmate from F-Block (the special housing unit) may receive a legal visit.* As a result of this rule, inmates of F-Block, including two plaintiffs, have been seriously restricted in their access to legal assistance. In the absence of a substantial justification, this restriction constitutes a violation of plaintiffs' Fourteenth Amendment right of access to the courts.

The principles for analyzing restrictions on inmates' access to counsel have been set forth by the Supreme Court in Procunier v. Martinez, supra, 416 U.S. at 419-22 (1974), a case challenging a ban on the entry of certain law students

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* Complaint ¶81, Appendix, p. A15; Affidavit of Assistant Attorney General Timothy F. O'Brien, ¶15, Appendix, p. A27.

and paraprofessionals into the California prisons. The Court stated:

> The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights. This means that inmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practice that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid. 416 U.S. at 419 (Emphasis added).

To determine whether a given practice "unjustifiably obstructs" the availability of counsel, "the extent to which that right is burdened by a particular regulation or practice must be weighed against the legitimate interest of penal administration." Id. at 420. In this balancing process, the prison officials have the burden of showing that the restriction on access to counsel is justified and that no less restrictive means is available to accomplish the given goal of penal administration. Id. See also, Johnson v. Avery, supra, 393 U.S. at 488-90; Shakur v. Malcolm, 525 F.2d 1144, 1148 n.2 (2d Cir. 1975); Younger v. Gilmore, 319 F.Supp. 105 (N.D.Cal. 1970), aff'd, 404 U.S. 15 (1971); Wilson v. Beame, 380 F.Supp. 1232, 1242 (E.D.N.Y. 1974).

Plaintiffs have alleged a serious and unjustified restriction on their right of access to counsel. The rule at Great Meadow prevents all other F-Block inmates from consulting with counsel any time one inmate from that block is receiving a legal

visit.* If one inmate is receiving a day-long legal visit, no other inmate can see counsel that day. Visiting attorneys, of course, have no way of anticipating when this interference with access to their clients will occur. The restrictive effect of this rule on access to counsel is obvious, and is compounded by the fact that Great Meadow Correctional Facility is located in Comstock, New York, over seventy miles from Albany, the closest major city. Cf. Procunier v. Martinez, supra, 416 U.S. at 420.

At the very least, delays in seeing clients caused by this practice will waste attorney time which could otherwise be spent assisting that client or others.** In many instances, such as that alleged in the instant complaint, an inmate will be deprived entirely of a counsel visit on a given day, and many days may pass before the attorney can return, causing a delay in securing the inmate's legal rights. Often, the harm caused by denial of access to counsel cannot be remedied by a subsequent legal visit. For example, though an inmate may not be represented by counsel at a disciplinary hearing, Wolff v. McDonnell, 418 U.S. 539 (1974); Baxter v. Palmigiano, ___ U.S. ___, 96 S.Ct. 1551, 1556 (1976), a conference with

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* Inmates of F-Block are likely to have a disproportionately high share of legal problems, stemming from the disciplinary proceedings which resulted in their confinement in segregation and from the restrictive conditions of segregation itself.

** This of course increases the cost of representation for those attorneys who do visit Great Meadow and discourages other attorneys from visiting as frequently as they otherwise might. These effect were found to be "a substantial burden on the right of access to the courts" in Procunier v. Martinez, supra, 416 U.S. at 420.

counsel prior to the hearing may greatly aid him in preparing his defense and protecting his procedural rights at the hearing. Since a hearing should ordinarily take place within a few days of the alleged offense, Powell v. Ward, 542 F.2d 101 (2d Cir. 1976), Crooks v. Wayne, 516 F.2d 837, 839 (2d Cir. 1975), there is only a brief period prior to the hearing in which to consult with counsel. In sum, the complaint describes a practice whose effect is to restrict plaintiffs' access to legal representation.

At this stage of the proceedings, plaintiffs' allegations must be accepted as true, Cooper v. Pate, supra, and Judge Foley was clearly in error in making findings that the restrictions on access to counsel were justified.* In his opinion dismissing the complaint, Judge Foley described the restriction of F-Block inmates to one legal visit at a time as "an isolated incident" which "does not reflect any intent to block attorney interviewers."** The "finding" that the incident alleged in the complaint was "isolated" is surprising in view of the fact that both sides agree that there is a standing policy permitting only one F-Block inmate at a time to meet with counsel. The absence of "intent to block attorneys' visits" is irrelevant; the appropriate question is whether or

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* In his affidavit in support of the motion to dismiss at ¶15, Assistant Attorney General O'Brien states only: "The denial of an attorney visit to an inmate based upon security and/or a rule with respect to visiting hours are matters of pure internal prison management." (Appendix, p. A27) Even if it is assumed that Judge Foley treated this affidavit as one in support of a motion for summary judgment, its contentions are insufficient to warrant grating judgment for defendants. See infra, p. 18 fn.

** Memorandum-Decision and Order at p. 19; Appendix, p. A42.

not the effect of the policy is to place a restriction on access to counsel. Procunier v. Martinez, supra, 416 U.S. at 419-422; cf., Monroe v. Pape, 365 U.S. 167, 187 (1961). Moreover, there is no factual support for the court's statement. If anything, the fact that more than one inmate at a time may have a personal visit but not a counsel visit leads to the inference that defendants below did intend to interfere with counsel visits. See infra, p. 19. Intentional interference with access to the courts by prison officials at Great Meadow Correctional Facility is not unknown to the Court, Corby v. Conboy, 457 F.2d 251 (2d Cir. 1972); see also, Sostre v. McGinnis, 442 F.2d 178, 200-201 (2d Cir. 1972) (interference with legal mail).*

The Court below also stated that "such inconveniences must be borne because we deal with tense environment[s] where large prison populations have to be moved around with primary concern at all times for institutional security."** There was no fiuding, nor could there be in a ruling on a motion

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* Judge Foley also took "judicial notice" that there is no deliberate interference with access to the courts for New York state prisoners because "[t]heir mail, petitions, and complaints flow freely into this District Court." Appendix, p.A42. This "finding" is both an improper subject of judicial notice, Fed. R. Evid. 201, and irrelevant to the allegations of the complaint.

** Not only does this conclusion lack evidentiary support, it moreover clearly does not outweigh the right to the availability of legal counsel. Even the "not insignificant state interest in preventing the establishment of personal power structures by unscrupulous jailhouse lawyers and the attendant problems of prison discipline that follow" was held insufficient to justify restrictions on access to the courts in Johnson v. Avery, supra, 393 U.S. 483; Procunier v. Martinez, supra, 416 U.S.at 421-22. See also, Navarette v. Enomoto, 536 F.2d 277 (9th Cir. 1976); Souza v. Travisono, 496 F.2d 1120 (1st Cir. 1974); Wilson v. Schoonfield, 404 F.Supp. 1192 (D.D.Ca. 1975).

to dismiss, that any particular needs of institutional security require the rule at issue. If anything, the record before the District Court indicates that the rule cannot be justified by security needs. As alleged in the complaint, "an inmate in F-Block who received a family visit would be permitted to visit in the same visiting room even if another inmate from F-Block was also in the visiting room on a family or legal visit."* If more than one inmate from F-Block at a time is allowed in the visiting room for a family visit, it is hard to see how "security" or other institutional needs could justify a restriction on the number of inmates who can receive counsel visit at the same time. The arbitrariness of the distinction between the two kinds of visits is indicative of "the absence of any real justification for the sweeping prohibition" of the practice at issue. Procunier v. Martinez, supra, 416 U.S. at 421.

Appellants have alleged a substantial restriction on their ability to meet with counsel and the district court was thus in error in granting defendants' motion to dismiss for failure to state a claim. This cause of action should therefore be remanded to the District Court with instructions to hold an evidentiary hearing, or, in the absence of allegations by defendants justifying the practice, to grant summary judgment for plaintiffs.

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* Complaint ¶84, Appendix, p. A15. Members of the general population at Great Meadow may receive legal visits regardless of how many other inmates are also consulting with counsel at that time. Complaint ¶83, Appendix, p. A15.

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT DISMISSING THE FIRST AND FIFTH CAUSES OF ACTION SHOULD BE VACATED AND THE CASE REMANDED FOR FURTHER PROCEEDINGS.

Respectfully submitted,

PIERCE CERETY, JR.
CLAUDIA ANGELOS
ELIZABETH A. GAYNES
DANIEL J. STEINBOCK
PRISONERS' LEGAL SERVICES
OF NEW YORK*
100 Church Street
New York, New York 10007
(212) 285-9370

* The assistance of Gary A. Hughes, Albany Law School class of 1977, is gratefully acknowledged.

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